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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

J. CLENTON HENSON and SHEILA HENSON LUTZ,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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REPLY BRIEF OF PETITIONERS

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In the petition, we argued that ordinarily a search warrant for "any and all records" of a business violates the particularity requirement of the Fourth Amendment. We showed that the decision below, upholding the use of such a warrant, conflicts with the decisions of this Court and other courts of appeals which have upheld broadly phrased warrants only where such warrants limited the scope of a search to particular transactions, a particular criminal offense or a specific category of documents. The United States, in its opposition, distorts petitioners' argument by suggesting that petitioners would require all searches to be limited to specific transactions. Moreover, the United States has abandoned entirely the reasoning of the decision below and now argues that the warrant

was appropriate because petitioners' business was "permeated with fraud."

1. The primary flaw with the United States' Opposition is that it has rejected the theory upon which it—and the court of appeals—relied below and now argues that the general warrant was permissible because petitioners' business was "permeated with fraud." Br. in Opp. 7. However, it is not this newly articulated theory that is before this Court, but rather the court of appeals' published opinion upholding the warrant as sufficiently particular. As petitioners noted previously (Pet. 14 n.15), a "pervasive fraud" argument is inappropriate in this case because neither the district court nor the court of appeals found that there was probable cause to believe that petitioners' business was permeated with fraud.[1]

In the absence of the required finding by the Sixth Circuit that petitioners' business was pervasively fraudulent, the United States attempts to rely upon the Sixth Circuit's statements that "the affidavit suggested an ongoing scheme to purchase automobiles and resell them with tampered odometers" and that "the warrant in this case was as 'specific as the nature of the activity under investigation permitted.'" Pet. App. 17a. (quoting *United States* v. *Shoffner*, 826 F.2d 619 (7th Cir.), *cert. denied*, 108 S. Ct. 356 (1987).

But the reliance on *Shoffner* is misplaced. In *Shoffner*, the court stated that:

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[1] The United States also suggests that review by this Court is inappropriate in this case involving a "fact-bound determination" that there was sufficient probable cause to justify such a search. Br. in Opp. 6, 8. Of course, the courts below made no determination —"fact-bound" or otherwise—regarding the "pervasive fraud" argument that the United States has now raised. In any event, all Fourth Amendment cases involve relatively fact-intensive analyses and this case clearly presents a substantial and recurring issue of constitutional law regarding the permissible scope of searches for any and all business records.

> The affidavit in this case averred a continuing criminal scheme involving stolen automobiles. Law enforcement authorities had every reason to believe that some of the vehicles named in the affidavit would no longer be on the premises when they executed the search warrant, and that others would have been added. In sum, the warrant in this case was as "specific as [the circumstances and] the nature of the activity under investigation permit[ted]."

826 F.2d at 631 (quoting *United States* v. *Blum*, 753 F.2d 999, 1001 (11th Cir. 1985).

The warrant in *Shoffner*, however, was specifically limited to "documentation concerning the purchase, sale, ownership, titling and licensing of stolen motor vehicles." 826 F.2d at 630. Thus, the warrant included two specific limits: first, it identified particular criminal activity, which this Court cited in *Andresen*, and second, it identified broad categories of documents upon which other courts of appeals have relied. *See Andresen* v. *Maryland*, 427 U.S. 463 (1976). The Sixth Circuit's—and the United States' —reliance on *Shoffner* emphasizes that (1) the warrant at issue clearly was impermissibly broad and unnecessarily so; and (2) this was not a case in which the pervasively fraudulent nature of the business made it impossible to narrow the scope of the warrant.

Finally, all of the evidence relied upon by the government to demonstrate the "pervasive" nature of the fraud relates to the narrow class of the 76 specific transactions (*i.e.*, the automobiles purchased in California) that had been investigated by the government. Br. in Opp. 3. The United States' suggestion that this constitutes evidence of "pervasive fraud" would turn this "rare" exception (Pet. 14 n.15) to the particularity requirement of the Fourth Amendment into the general rule.

2. In this case, the Sixth Circuit upheld a warrant authorizing a search for and the seizure of all records of a business—a warrant with *no* limitations. In *Andresen*,

this Court rejected a claim that the scope of a search warrant was too broad to satisfy the particularity requirement of the Fourth Amendment by expressly relying upon the fact that the warrant was limited to documents relating to a particular transaction and to a particular offense. Pet. 9-12. The United States simply asserts, without explanation, that "[n]othing in the *Andresen* case precludes the government from conducting an area-wide search . . . ." Br. in Opp. 7. However, it is clear from the decision in *Andresen* that, without the limitations contained in the search warrant, that warrant would not have withstood scrutiny under the Fourth Amendment.

Contrary to the United States' repeated assertion (Br. in Opp. 5, 7), petitioners do not suggest that there was only one permissible method by which the scope of the warrant could have been circumscribed. Rather, petitioners pointed to three separate limitations that courts have relied upon to uphold warrants that would otherwise be impermissible: limitations based upon specific transactions, specific offenses or particular categories of documents. Pet. 12. For example, in this case, the magistrate could have limited the scope of the search to the 76 specific transactions that had been investigated, just as the warrant in *Andresen* was limited to a single transaction. Or somewhat more broadly, the government could have restricted the warrant to all transactions involving California auto auction dealers. Pet. App. 11a. Similarly, the warrant could have been limited to the specific offenses that prosecutors were investigating—mail fraud and odometer tampering.[2] In addition, the search could

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[2] Other circuits have, in certain situations, upheld broadly phrased warrants for records limited to specific criminal activity. *See, e.g., United States* v. *Timpani*, 665 F.2d 1, 4-5 (1st Cir. 1981) (records relating to "gambling and loansharking"); *United States* v. *Fannin*, 817 F.2d 1379, 1383 (9th Cir. 1987) (documents relating to drug trafficking).

have been limited to certain categories of documents.[3] The United States simply ignores the absence of these limits.

The United States also fails to distinguish adequately the cases in other circuits with which the decision of the court below conflicts. Decisions in three other circuits have struck down warrants with language nearly identical to that approved by the Sixth Circuit. *See* Pet. 12-14. Curiously, the United States claims that petitioners' reliance on *United States* v. *Abrams*, 615 F.2d 541 (1st Cir. 1980), is "misplaced." Br. in Opp. 8. That decision is neither cited nor relied upon by petitioners. Instead, the conflict is between the opinion below and the First Circuit's opinion in *United States* v. *Roche*, 614 F.2d 6 (1st Cir. 1980). *See* Pet. 13. That case is clearly on point and indistinguishable from the instant case.

3. The petition also presents a substantial issue of statutory interpretation regarding the criminal provisions of the Motor Vehicle Information and Cost Savings Act, 15 U.S.C. §§ 1981 *et seq.* Petitioner Henson was convicted for causing a transferor to give someone a false odometer statement. The Sixth Circuit's opinion upholding petitioner's criminal liability is clearly at odds with the Ninth Circuit's decision in *United States* v. *Powell*, 806 F.2d 1421 (9th Cir. 1986), holding that only "transferors" may be convicted under the statutory provisions on which petitioner Henson's conviction was based.

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[3] The United States relies on *United States* v. *Brien*, 617 F.2d 299 (1st Cir.), *cert. denied*, 446 U.S. 919 (1980). In that case, however, the warrant upheld by the First Circuit was limited to categories of documents—"bank statements, cash receipt books, option purchase records, sales material distributed to customers, employee compensation records, customer account records, sales training material and customer lists." *Id.* at 306.

CONCLUSION

For the foregoing reasons and those presented in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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